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Judgment of the Court of 20 October 1993. - Maurizio Balocchi v Ministero delle Finanze dello Stato. - Reference for a preliminary ruling: Tribunale di Genova - Italy. - Sixth directive VAT - Payment of the net amount of VAT - Interim payment due on that amount. - Case C-10/92.

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Keywords

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1. Preliminary rulings ° Reference to the Court ° Need for both parties to have been heard ° Assessment by the national court

(EEC Treaty, Art. 177)

2. Preliminary rulings ° Reference to the Court ° Compliance of the decision to make a reference with the rules of national law governing the organization of the courts and their procedure ° Not a matter for the Court to verify

(EEC Treaty, Art. 177)

3. Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Payment of the tax after it has become chargeable ° National system requiring taxable persons to make interim payments in the nature of advances ° Incompatibility with the Sixth Directive ° Possibility for individuals to rely on the corresponding provisions

(Council Directive 77/388, Arts 10 and 22(4) and (5))

Summary

1. Whilst, in the context of the procedure provided for by Article 177 of the Treaty, it may be in the interests of the proper administration of justice that a question should be referred to the Court for a preliminary ruling only after both sides have been heard, such a requirement is not among the conditions laid down for the implementation of that procedure. It is therefore for the national court

alone to assess the need for hearing the defendant before making an order for reference.

2. In the context of the procedure provided for by Article 177 of the Treaty, it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organization of the courts and their procedure. The Court must therefore abide by the decision from a court of a Member State requesting a preliminary ruling in so far as it has not been overturned in any appeal procedures provided for by national law.

3. It is contrary to Article 10 and Article 22(4) and (5) of the Sixth Council Directive (77/388/EEC) ° which provide, first, that value added tax becomes chargeable at the time when the goods are delivered or the services are performed and, secondly, that the Member States may derogate from the rule that payment must be made when the periodical return is submitted by demanding interim payment ° for provisions of national law to require taxable persons to pay value added tax equal to 65% of the total chargeable amount in respect of a period which has not yet expired, with the result that taxable persons, in certain circumstances, have to pay tax on transactions which have not yet been carried out. Such legislation has the effect of transforming the interim payments into advances which are contrary to the rule of the directive under which Member States should require value added tax to be paid only in respect of transactions which have been performed.

Taxable persons required to make such payments may rely in the national court on the aforementioned provisions of the Sixth Directive.

Parties

In Case C-10/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the President of the Tribunale di Genova (District Court, Genoa) for a preliminary ruling in the proceedings pending before that court between

Maurizio Balocchi

and

Ministero delle Finanze,

on the interpretation of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ° Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida, D.A.O. Edward (Presidents of Chambers), R. Joliet, F.A. Schockweiler, F. Grévisse, M. Zuleeg and J.L. Murray, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° *Maurizio Balocchi, by Filippo Capozio, Giuseppe Conte and Giuseppe Giacomini, of the Genoa Bar,*

° *the Italian Government, by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs of the Ministry for Foreign Affairs, acting as Agent, assisted by Franco Favara, Avvocato dello Stato,*

° *Commission of the European Communities, by Enrico Traversa, of its Legal Service, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, and Monica Medici, of the Modena Bar,*

having regard to the Report for the Hearing,

after hearing the oral observations of Maurizio Balocchi, the Italian Government, the United Kingdom, represented by Susan Cochrane, of the Treasury Solicitor's Department, acting as Agent, and Stephen Richards, Barrister-at-law, and the Commission, at the hearing on 10 February 1993,

after hearing the Opinion of the Advocate General at the sitting on 24 March 1993,

gives the following

Judgment

Grounds

1 *By order of 18 December 1991, which was received at the Court on 9 January 1992, the President of the Tribunale di Genova referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ° Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter "the Sixth Directive").*

2 *Those questions were raised in the course of proceedings between Mr Balocchi, an Italian national, and the Italian Ministry of Finance concerning the making of an interim payment of value added tax (hereinafter "VAT").*

3 *Under the Italian VAT rules, the duration of the tax period is fixed at one year (1 January to 31 December). Taxable persons have to submit an annual return for each tax period by no later than 5 March of the following year. That annual return is recapitulative in nature, since, during the tax period, they have to make monthly or quarterly payments, depending on the size of their turnover. When they submit their annual return to the tax authorities, taxable persons pay the balance of the VAT outstanding in respect of their business for the whole tax period or recover any excess VAT paid, as the case may be.*

4 *Before 1991 the amount of VAT due in respect of the last quarter of the year was in principle paid on the occasion of the annual return submitted in March the following year. That rule was amended by the second paragraph of Article 6 of Law No 405/90 of 29 December 1990 (hereinafter "Law No 405/90", suppl. ord. GURI No 303 of 31 December 1990), which entered into force on 1 January 1991.*

5 *Under the new rules, taxable persons who are under an obligation to make monthly payments must, by no later than 20 December, pay by way of interim payment of the VAT due for that month an amount equal to 65% of the payment that they made (or should have made) for December of*

the previous year. If they anticipate that the amount due for December of the current year will be less than the amount paid for the same month of the previous year, taxable persons may elect to pay, within the same time-limit, an amount equal to 65% of the VAT which they consider they should pay for the current month of December.

6 Taxable persons under an obligation to make quarterly payments must pay, also by no later than 20 December, by way of interim payment of the amount due on the occasion of the annual return, an amount equal to 65% of the payment which they made (or should have made) for the fourth quarter of the previous year or, in the event that it is less, 65% of the amount to be paid for the fourth quarter of the current year.

7 Consequently, in order to calculate the interim payment to be made before 20 December of the current year, two possibilities are open to the taxable person irrespective of whether he has to make monthly or quarterly payments. He may either base his calculation on the sum paid in the previous year by way of the last (monthly or quarterly) payment, or base himself on the amount of VAT which he considers he should pay at the end of the current year by way of the last (monthly or quarterly) payment. However, in the latter case, the fifth paragraph of Article 6 of Law No 405/90 provides that a 20% surcharge on unpaid sums will be imposed upon taxable persons who do not pay all or part of the amount due.

8 Mr Balocchi is a real-estate administrator in Italy and, as a result, is subject to VAT. Since he falls within the class of taxpayers whose annual turnover is less than LIT 360 million, he qualifies for the system of quarterly payments, known as the "simplified system". As such, under Article 33 of Decree No 633/72 of the President of the Republic (suppl. ord. GURI No 292 of 1 November 1972), he has to make periodic payments before the fifth day of the second month following each of the first three quarters of the year. Since 1991 he has had to pay in respect of the fourth quarter the interim payment laid down in the second paragraph of Article 6 of Law No 405/90 by no later than 20 December.

9 Mr Balocchi takes issue with the aforementioned Article 6 on the ground that it requires an interim payment to be made, before the end of the last quarter of the year, of the VAT for the whole of that quarter. He argues that, as a result, part of the interim payment to be made relates to VAT on services which have not yet been performed and on amounts which have not yet been received.

10 In his view, that provision is contrary to Articles 10 and 11 of the Sixth Directive, under which VAT is not chargeable until the taxable transaction has been carried out. In order to assert this view, Mr Balocchi brought an action in the Tribunale di Genova for a declaration that the aforementioned Italian provision was incompatible with Community law, and asked the President of that court to suspend provisionally as far as he was concerned the obligation to make the interim payment arising under that provision; that application was granted. The President of the Tribunale di Genova further considered that the outcome of the main proceedings depended upon the interpretation of Community law and referred the following questions to the Court for a preliminary ruling:

"(1) Have the rules set out in Articles 10 and 11 of the Sixth Directive of the Council of the European Communities of 17 May 1977 (77/388/EEC) (OJ No 145 of 13 June 1977) harmonized the concepts 'chargeable event' and 'the time when the tax becomes chargeable' and, if so, do those rules confer on individuals rights which they may assert before a national court?

(2) In the event that the first question is answered in the affirmative, what has to be regarded as the taxable event and the time when the tax becomes due? Do Articles 10 and 11 of the aforementioned directive, as they have been interpreted by the Court of Justice, preclude the application of a national rule (Article 6 of Law No 405/90) which requires suppliers of services to pay VAT on services which they have not yet performed and on amounts which they have not yet

received?"

11 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

12 The Italian Government submits in the first place that the preliminary question was raised in proceedings in which not all the parties were heard, since the Italian Ministry of Finance did not have an opportunity to intervene and present its observations against the arguments put forward by Mr Balocchi. As a result, the request for a preliminary ruling should be regarded as inadmissible.

13 According to the case-law of the Court, it may indeed be in the interests of the proper administration of justice that a question should be referred to the Court for a preliminary ruling only after both sides have been heard.

14 Nevertheless, it should be held that the existence of a prior discussion in which both sides have been heard is not among the conditions laid down for the implementation of the procedure provided for in Article 177 of the Treaty and it is for the national court alone to assess the need for hearing the defendant before making an order for reference (see Case 70/77 Simmenthal v Amministrazione delle Finanze [1978] ECR 1453).

15 The Italian Government further contests the admissibility of the request for a preliminary ruling on the ground that the national court has no jurisdiction in tax matters.

16 That argument is a matter of national law and therefore cannot be accepted. The Court laid down the principle in Case 65/81 *Reina v Landeskreditbank* [1982] ECR 33, paragraph 7, that it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organization of the courts and their procedure.

17 The Court must therefore abide by the decision from a court of a Member State requesting a preliminary ruling in so far as it has not been overturned in any appeal procedures provided for by national law.

Substance

The conditions under which a system of interim payments may be lawful

18 The national court's order seeks essentially to establish whether, first, it is contrary to the relevant provisions of the Sixth Directive for national legislation to impose on taxable persons an obligation to pay an amount of VAT which is equal to 65% of the total chargeable amount for a tax period which has not yet expired.

19 Under the Italian rule in issue, in Article 6 of Law No 405/90, taxable persons must make an interim payment of 65% of the VAT due for the whole of the last month or quarter of the year when that period has not yet expired. The plaintiff in the main proceedings and the Commission argue that that interim payment has the effect of obliging taxable persons to pay VAT on transactions which have not yet been carried out and that the provision providing for that interim payment is therefore contrary to Article 10(2) of the Sixth Directive.

20 VAT is a turnover tax charged on the supply of goods or services. As the Advocate General rightly points out, it follows from the system of the Sixth Directive that value added tax is in principle payable only after the event.

21 It should be borne in mind that the provisions of Article 10 of the Sixth Directive harmonized the concepts of chargeable event and chargeability of VAT.

22 Under Article 10(1) of the Sixth Directive the chargeable event is regarded as being "the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled". As for when the tax becomes "chargeable", this means "when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay".

23 Article 10(2) provides that "the chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed".

24 However, it should be emphasized that a distinction has to be drawn between, on the one hand, the concepts of chargeable event and chargeability of tax, covered by Article 10, and, on the other hand, that of the payment of the tax. The provisions of the Sixth Directive relating to the system for the payment of VAT were not referred to in the national court's order. They are, however, relevant to this case. The general rule, which is set out in Article 22(5) of the Sixth Directive, is that "every taxable person shall pay the net amount of the value added tax when submitting the return". According to Article 22(4), the return is to be submitted after the end of the tax period within an interval to be determined by each Member State, which may not exceed two months.

25 However, in view of the fact that, in the field of VAT, taxable persons act as tax collectors for the State and in order to avoid large sums of public money accumulating in their hands during a tax period, Article 22(5) of the Sixth Directive authorizes the States to derogate from the rule that payment must be made when the return is submitted and to demand interim payment.

26 Since, at the time when those interim payments are made, the accounts for the period in question have generally not yet been cleared, it is permissible for the Member States to designate as a reference point the turnover made during the corresponding period of the previous year. It is indeed possible that that figure will be in excess of the turnover actually made during the period covered by the interim payment when an ° even slight ° decline has taken place in relation to the previous year. In order to obviate this risk it is sufficient that the Member States give taxable persons the possibility of determining the interim payment to be made on the basis of the turnover which, according to their estimates, they will have actually made at the end of the period in question, and do not surcharge them in the event that they underestimate in good faith the sum actually due.

27 The peculiarity of the Italian legislation lies in the fact that it requires taxable persons who do not wish to base themselves on the VAT paid in respect of the corresponding period of the previous year to make an interim payment calculated on the basis of the turnover to be made in a period which has not yet expired. Such a system may result in taxable persons who make a substantial fraction of their turnover during the last eleven days of the year, as is the case with the hotel industry, having to pay VAT on transactions which have not yet been performed. In the case of those taxable persons, the contested provision of Italian law has the effect of transforming the interim payments into advances which are contrary to the rule of the directive under which Member States should require VAT to be paid only in respect of transactions which have been performed.

28 The fact that the interim payments thus become advances is particularly manifest in the case of taxable persons who are required to make monthly payments. For them, the amount of the interim payment is more or less precisely proportional to the number of days of the month between 1 and

20 December, namely 64.5%. Consequently, the slightest decline in turnover between one year and the next or the slightest error in estimating the turnover to be made at the end of the current year will result in an obligation to make an interim payment which is manifestly greater than the sum actually due on 20 December of the current year. In contrast, in the case of taxable persons having to make quarterly payments, the risk is smaller, since 88% of the quarter is already past when, on 20 December, the 65% interim payment due in respect of the last quarter of the current year has to be made.

29 The Italian Government points out in this connection that it affords taxable persons the possibility of basing themselves on their actual turnover for the current month or quarter rather than referring to the turnover made in the previous year in respect of the corresponding month or quarter.

30 That option is not decisive. The problem inherent in the Italian legislation arises whether the reference point is the current year or the previous year.

31 In the light of the foregoing the reply to be given to the national court's question is that it is contrary to Article 10 and Article 22(4) and (5) of the Sixth Directive for national legislation to impose on taxable persons an obligation to pay VAT equal to 65% of the total amount chargeable in respect of a period which has not yet expired.

Direct effect of the relevant provisions of the directive

32 It further appears from the order for reference that the national court seeks in the second place to establish whether the relevant provisions of the Sixth Directive preclude the application of Article 6 of Law No 405/90, which requires suppliers of services to pay VAT on services which they have not yet performed, and whether they confer on individuals rights which they may assert in a national court.

33 In order to answer that question it is sufficient to refer to the Court's consistent case-law with regard to reliance on directives in national courts (see Case 8/81 Becker [1982] ECR 53).

34 It appears from this case-law that, despite the Member States' relatively large latitude in implementing certain provisions of the Sixth Directive, individuals may effectively assert in national courts provisions of the directive which are sufficiently clear, precise and unconditional.

35 The provisions of Article 10 and Article 22(4) and (5) satisfy those criteria. As a result, they confer on individuals rights on which they may rely in national courts in order to oppose national rules which are incompatible with those provisions.

36 Consequently, the following reply should be given to the questions referred by the President of the Tribunale di Genova:

(1) It is contrary to Article 10 and Article 22(4) and (5) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ° Common system of value added tax: uniform basis of assessment, for provisions of national law to require taxable persons to pay VAT equal to 65% of the total chargeable amount in respect of a period which has not yet expired.

(2) Taxable persons required to make such payments may rely in the national court on the applicable provisions of the directive, namely Article 10 and Article 22(4) and (5).

Decision on costs

Costs

37 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the President of the Tribunale di Genova, by order of 30 December 1991, hereby rules:

- 1. It is contrary to Article 10 and Article 22(4) and (5) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ° Common system of value added tax: uniform basis of assessment, for provisions of national law to require taxable persons to pay VAT equal to 65% of the total chargeable amount in respect of a period which has not yet expired.*
- 2. Taxable persons required to make such payments may rely in the national court on the applicable provisions of the directive, namely Article 10 and Article 22(4) and (5).*